Hongkong and Shanghai Banking Corporation Ltd v Kemajuan Bersatu Enterprise Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES (WINDING-UP) NO D3–28–298–91
VC GEORGE J
22 JANUARY 1992

Companies and Corporations *— Winding up — Provisional liquidators — Application for appointment — Whether an abuse of process of court — Principles applicable — Companies Act 1965 s 231*

Companies and Corporations *— Winding up — Insolvency — Presumption of inability to pay debts — Statutory letter of demand sent — Letter did not mention that presumption would arise if company had within prescribed time not only failed to pay debt but also failed to secure or compound it to reasonable satisfaction of creditor — Whether letter effective to raise presumption — Companies Act 1965 s 218(2)(a)*

The petitioner filed a winding-up petition against the respondent company and applied for the appointment of provisional liquidators of the company pursuant to s 231 of the Companies Act 1965 ('the Act') pending the disposal of the petition or until further order. The company had been in the business of housing development but eventually had ceased business and abandoned its housing project. The winding-up petition was based on the company's failure to comply with the letter issued by the petitioner under s 218 of the Act by which the petitioner demanded payment of the sum owing to the petitioner and giving notice that if the sum was not paid within three weeks of the receipt of the letter, the company shall be deemed to be unable to pay its debts within the meaning of the section and that winding-up proceedings shall thereafter be instituted against the company.

It was said in opposition to the application that the letter of demand failed to state that the presumption that the company was unable to pay its debts arose if the company had for three weeks after the letter was left at its registered office not only neglected to pay the sum but also failed to secure or compound it to the reasonable satisfaction of the creditor. It was therefore contended that the letter was ineffective in relation to raising the presumption under s 218(2)(a) of the Act. It was also contended that the court should be slow to appoint a provisional liquidator where the evidence did not suggest some urgency and that the court should be wary of the fact that the application could be an abuse of the process of the court.

Held, allowing the application and petition:

(1) Section 231 of the Act confers on the court an unfettered discretionary power but that power must be exercised in a proper judicial manner. In the proper exercise of its discretion the court must be satisfied that ultimately the court is likely to make the winding-up orders sought in the petition.

(2) Section 218(2)(a) of the Act has to be read as having two limbs, the first of which prescribes what the creditor has to do to invoke the presumption. The creditor has to serve on the company by leaving at its registered office a demand under his hand or under the hand of his authorized agent requiring the company to pay the sum then due. The second limb then prescribes that the debtor company has three weeks within which to pay the sum or to secure or compound for it. Since what the debtor company can do is statutorily prescribed there is no call for the creditor to spell out what the law prescribes. It is sufficient that it is clear from the contents of the letter of demand that it is a s 218(2)(a) notice which clarity can be achieved, inter alia, by a reference in the letter to s 218(2)(a) and by the letter giving the debtor three weeks to meet the demand. The effect of the debtor company not complying with one or the other of the three courses open to it as prescribed by the second limb of s 218(2)(a) need not be spelt out in the letter.

(3) There was absolutely no evidence to suggest that the present application was an abuse of process of court.

[Bahasa Malaysia summary

Pempetisyen telah memfailkan satu petisyen penggulungan terhadap syarikat responden dan memohon untuk perlantikan likuidator sementara bagi syarikat itu mengikut s 231 Akta Syarikat 1965 ('Akta itu') ketika menantikan pendengaran petisyen itu atau sehingga perintah lanjut. Syarikat itu telah menjalankan perniagaan pemaju perumahan tetapi akhirnya telah memberhentikan urusan dan meninggalkan projek perumahan itu. Petisyen penggulungan adalah berasaskan kegagalan syarikat itu untuk mematuhi sepucuk surat yang dikeluarkan oleh pempetisyen di bawah s 218 Akta itu. Melalui surat itu pempetisyen meminta pembayaran jumlah yang terhutang kepada pempetisyen dan memberi notis bahawa jika jumlah itu tidak dibayar dalam masa tiga minggu selepas penerimaan surat itu, syarikat itu akan dianggap sebagai tidak berupaya membayar hutangnya mengikut makna seksyen itu dan bahawa prosiding penggulungan akan selepas itu dimulakan terhadap syarikat itu.

Dalam membalas permohonan itu, telah dikatakan bahawa surat permintaan itu gagal menyatakan bahawa anggapan syarikat itu tidak berupaya membayar hutangnya timbul jika syarikat itu, selepas tiga minggu surat itu ditinggalkan di pejabat berdaftarnya, bukan sahaja mengabaikan pembayaran jumlah itu tetapi juga gagal menjamin atau mengkompaunkan jumlah itu kepada kepuasan munasabah pemiutang. Dengan itu telah dihujah bahawa surat itu tidak berkesan untuk menimbulkan anggapan di bawah s 218(2)(a) Akta itu. Juga telah didakwa bahawa mahkamah seharusnya bertindak secara perlahan dalam melantik seorang likuidator sementara di mana keterangan tidak menunjukkan sesuatu kegentingan dan bahawa mahkamah seharusnya mengambil ingat akan hakikat yang permohonan itu mungkin menjadi penyalahgunaan proses mahkamah.

Diputuskan, membenarkan pemohonan dan petisyen itu:

(1) Seksyen 231 Akta itu memberikan mahkamah kuasa budi bicara yang tidak terhad tetapi kuasa itu mesti dijalankan dalam sifat kehakiman yang betul. Dalam menggunakan kuasa budi bicaranya secara betul, mahkamah mesti berpuas hati bahawa akhirnya mahkamah mungkin sekali membuat perintah penggulungan yang dipohon dalam petisyen itu.

(2) Seksyen 218(2)(a) Akta itu harus dibaca sebagai mengandungi dua sendi, yang pertamanya menggariskan apa yang harus dibuat oleh pemiutang untuk menimbulkan anggapan itu. Pemiutang itu harus membuat servis pada syarikat itu dengan meninggalkan di pejabat berdaftarnya satu permintaan di bawah tangan pemiutang atau di bawah tangan ejen yang diberi kuasanya yang mengkehendaki syarikat itu membayar jumlah yang kena dibayar pada masa itu. Sendi kedua kemudiannya memperuntukkan bahawa syarikat penghutang diberi tiga minggu untuk membayar jumlah itu atau untuk menjamin atau mengkompaunkan jumlah itu. Oleh kerana apa yang boleh dibuat oleh syarikat penghutang diperuntukkan oleh statut, tidaklah ada sebab untuk pemiutang menyatakan apa yang diperuntukkan oleh statut. Adalah mencukupi bahawa memang jelas dari kandungan surat permintaan itu bahawa ianya adalah satu notis menurut s 218(2)(a). Kejelasan itu boleh dicapai, antara lainnya, melalui rujukan di dalam surat itu kepada s 218(2)(a) dan dengan surat itu memberi penghutang tiga minggu untuk mematuhi permintaan itu. Kesan syarikat penghutang tidak mematuhi satu atau lain-lain daripada tiga jalan yang terbuka kepadanya seperti yang diperuntukkan oleh sendi kedua s 218(2)(a) tidak perlu dinyatakan dalam surat itu.

(3) Tidak ada keterangan sama sekali yang menyarankan bahawa permohonan ini adalah satu penyalahgunaan proses mahkamah.]

Cases referred to

1 *Re Highfield Commodities Ltd* [1984] 3 All ER 884; [1985] 1 WLR 149 (folld)
2 *Re McLennan Holdings Pty Ltd* (1983) 7 ACLR 732 (refd)
3 *Pitt v Bachmann* (1980) 5 ACLR 282 (refd)
4 *Re ML Industries Pty Ltd* (1981) 5 ACLR 769 (refd)
5 *Re Club Mediterranean Pty Ltd* (1975) 11 SASR 481 (refd)
6 *Re Qintex Ltd (No 3)* [1990] 2 ACSR 627 (refd)
7 *Re Perusahaan Jenwatt Sdn Bhd* [1990] 2 MLJ 178 (refd)
8 *Re Yap Kim Kee & Sons Sdn Bhd* [1990] 2 MLJ 108 (refd)
9 *JC Scott Constructions v Mermaid Waters Tavern Pty Ltd & Anor* [1984] 2 ACLC 35 (refd)
10 *Cope Allman (M) Pty Ltd v The Marrickville Businessman's Club Ltd* [1983] 1 ACLC 1003 (not folld)

Legislation referred to

Companies Act 1965 ss 218, 231
Companies (Winding-Up) Rules 1972 rr 2, 35(1)
Companies Act 1948 [UK] s 238

Tommy Thomas (*Sitpah Selvaratnam* with him) (*Skrine & Co*) for the petitioner.

G Sri Ram (*Sri Ram & Co*) as amicus curiae.

Lee Yee Kuang (*Senior Assistant Official Receiver*) for the Official Receiver.

J Malathi (*Rashid & Lee*) holding watching brief for TPPT Sdn Bhd.

Cur Adv Vult

VC George J: The petition to have Kemajuan Bersatu Enterprise Sdn Bhd wound up was presented on 16 August 1991. It has been fixed for disposal on 22 January 1992.

The matter now before me is the notice of motion encl 8 in the court file, by which the petitioner seeks to have appointed provisional liquidators of the respondent company pending the disposal of the petition or until further order.

The background

The respondent company was incorporated on 18 January 1978. Its primary business was that of a housing developer. Its main, if not only, undertaking was a housing development called Taman Kemajuan at Ulu Tiram in Johore, work on which was commenced in or about 1978. It was a down market development and was to consist of 129 units, largely of single storey terrace and semi-detached houses. The registered owner of the land on which the project was to be implemented was not the respondent company but one Hwa and Hwa Development Sdn Bhd ('Hwa & Hwa'). In order to finance the project the respondent company obtained loan facilities from the petitioner bank. As a measure of security for the facilities, the respondent company provided the bank with a third party charge of the said Hwa & Hwa land on which the project was to be implemented.

In or about 1984 the respondent company, it would seem, succumbed to financial problems and appeared to have abandoned the project without completing any of the units. Nothing significant had been effected in respect of the infrastructure of the development. However, in respect of some of the units, about 75% of the work to be done on them had been effected and in respect of the others, some 25%.

Prior to the abandonment, the respondent company had entered into sale and purchase agreements in respect of all the proposed 129 units with various separate individual purchasers. When the project was abandoned the respondent company owed the bank a substantial amount advanced to it pursuant to the said facilities which in the aggregate, together with accrued interest, amounted to $1,172,829.52 as at 31 May 1991. Further interest was payable on the advances until full realization.

The only asset the respondent company appears to have is the project itself in respect of which the land, as has been seen, belongs to Hwa & Hwa. Such accounts of the respondent company that have been made available to the petitioner bank's advisers, particulars of which have been disclosed to the court, suggest that about the time the project was abandoned the respondent company was hopelessly insolvent.

Not surprisingly none of the purchasers of the units appear to have done anything about the abandonment of the project. The credit manager of the Johore Bahru branch of the bank in an affidavit says that to his knowledge none of them nor the bank itself has the ability or expertise to take over and complete the project. A

Till mid-1990 the project looked as if it would suffer the fate of a large number of other abandoned projects whose stark skeletal remains can be seen reaching out to the sky in silent protest as one passes the outskirts of many of our towns, of being a permanent blot on the landscape. In June of that year the government established the Abandoned Housing Project Fund Scheme ('the fund') funded by the government and managed by a company called TPPT Sdn Bhd. Among the specific objects for the establishment of the fund are the revival of abandoned housing projects with a view to completing them and to provide purchasers of completed units with good title thereto. Among the other laudable objectives that the government sees being achieved by the revival of these abandoned projects (as set out in a release effected through Bank Negara) are the resolution of the problem of non-performing loans of the banking community arising from abandoned housing projects and the restoration of general business confidence in the housing industry which the government considers should provide a significant impact in the ongoing economic recovery process of the nation. B C D

It would appear that TPPT Sdn Bhd accepted the respondent company's said housing project at Ulu Tiram, Johore as an abandoned housing development could qualify for assistance from the fund. However, TPPT Sdn Bhd is not prepared to entrust the required funds for the rescue operation to the directors of the respondent company. This is not surprising as it would appear that not only has the company appeared to have abandoned the project but it has ceased to carry on business since about the mid-1980's. The statutory records filed with the Registrar of Companies show that the last annual general meeting of the company was held on 31 December 1984. E F

As has been seen, the 129 purchasers of the housing units are helpless. There must be other creditors of the company but none of them other than the bank appears to think it worthwhile to show any interest in the respondent company. Unlike the other creditors, the bank, which can in one sense be regarded as a secured creditor, apparently sees as an outcome of the rescue operation that TPPT Sdn Bhd might embark upon, many redeeming features not the least of which is that there would in all probability be the redemption of the Hwa & Hwa property charged to them since such redemption would be necessary for the provision of good and unencumbered title to the individual house purchasers of the units. However, the bank is apparently prepared to make a significant contribution in the exercise by waiving a substantial portion of the redemption amount. G H

The way round or out of the impasse presented by the respondent company not carrying on business (and in any event of TPPT Sdn Bhd not wanting to deal with the directors of the company) that the bank (and perhaps TPPT Sdn Bhd) sees is for the company to be wound up if it can be wound up and for the rescue operation to be entrusted to the liquidator. I

Having seen what they consider to be the solution to the problem the bank has not only petitioned the court to have the company would up but also seek by this notice of motion encl 8 for the appointment of two of the partners of the accountant firm of KPMG Peat Marwick as joint and several provisional liquidators of the respondent company to function as such until the winding-up order (if any) is made or further order. In the petition, one of the orders sought for is the appointment of the same two partners as joint and several liquidators of the respondent company.

Now, apparently there are any number of these revivable abandoned housing projects which had been started by companies that have, with the failure of the respective projects they have been involved with, ceased doing business. Many of the companies themselves, as it appears to be the situation in the instant case, have been abandoned by their directors and shareholders. Apparently more of these petitions to wind up such companies as a prelude to embarking on a TPPT type of rescue operation of such abandoned housing projects (with applications to have provisional liquidators appointed) are anticipated. It follows that, in a manner of speaking, the instant motion (and the petition itself) could be regarded as a test case. In the circumstances of it being obvious that although the respondent company had been served with the cause papers at its abandoned registered office, it was unlikely to appear or to be represented in court, I took it upon myself to invite one of the leaders of the Bar, Mr Gopal Sri Ram, to assist the court as amicus curiae which invitation he readily accepted. His brief was to argue in opposition to the motion which he has done in his usual meticulous style with a well-researched submission. The motion itself was competently moved by another very experienced member of the Bar, Mr Tommy Thomas (Cik Sitpah Selvaratnam with him). I also had the benefit of the experience and objective submissions of Mr Lee Yee Kuang, the senior of the senior assistant official receivers. Ms J Malathi held a watching brief for TPPT Sdn Bhd.

Jurisdiction to appoint a provisional liquidator

The power to appoint a provisional liquidator is given to the court by s 231 of the Companies Act 1965. It can be exercised at any time after the presentation of a winding-up petition and before the making of a winding-up order. Rule 35(1) of the Companies (Winding-Up) Rules 1972 elaborates on the power — the application for the appointment has to be made by 'any creditor or contributory' who should prove 'sufficient ground' for the appointment by affidavit. Creditor is defined in r 2 to include a corporation or a firm. No distinction is made between a secured or unsecured creditor. In fact no qualification is made in respect of 'any creditor'.

As the equipollent provisions in England and in Australia are in pari materia with our provisions, it is relevant to see how the courts in those jurisdictions have approached these provisions.

Now, it is to be observed that the discretionary power given by s 231 is in quite general terms. Sir Robert Megarry V-C could see no hint in the English equipollent section (s 238 of the 1948 Act) that the section is to be restricted to only where the company is obviously insolvent or where the

assets are in jeopardy — see *Re Highfield Commodities Ltd*[1] at p 893b. The section confers on the court an unfettered discretionary power but as the learned Vice-Chancellor puts it 'that power must obviously be exercised in a proper judicial manner'. The Australian courts have taken the same obvious view — see, for instance, *Re McLennan Holdings Pty Ltd*[2] at p 737 where *Pitt v Bachmann*[3] and *Re ML Industries Pty Ltd*[4] were followed in respect of the holding that after the due presentation of a petition to wind up which discloses proper grounds for winding up, the discretion to appoint a provisional liquidator is not limited.

The 'sufficient ground' for the appointment required by the rule has been the subject of judicial discussion both in Australia and in England. The circumstances in which the courts have made the orders vary infinitely. I think it is useful to quote the passage from the 1975 judgment of Bright J of the Supreme Court of S Australia in *Re Club Mediterranean Pty Ltd*[5] at p 484 that McPherson on *The Law of Company Liquidation* (3rd Ed) quotes at pp 100 and 101:

> Where the petitioning creditor makes the application and the company opposes it the court must come to a conclusion as to the degree of urgency and of need established by the petitioning creditor and the balance of convenience. The circumstances will vary. Sometimes the company may be continuing to trade at a loss or to incur further liabilities. Sometimes assets may require to be protected from dissipation or from seizure or encumbrance. Sometimes the right of the company to assets or the right to exercise an option, enforce a contract, reject a claim or otherwise to act for the apparent benefit of the company may be in issue and the issue may need to be resolved or carried forward or rights may need to be protected as a matter of urgency. Sometimes the company may be paralysed by a dispute between shareholders or directors, or by some form of interim court order. Sometimes there may be a conflict of interest between a director or principal officer of the company itself with regard to some right of property, and that conflict may render it difficult for the company's rights to receive proper protection.

As has been seen, in deciding whether to appoint a provisional liquidator the courts have repeatedly stressed that they have a wide discretion. Some examples are given by *McPherson* at p 101:

> Accordingly, provisional liquidators have been appointed: to investigate the affairs of the company in its own right or in its capacity as a trustee, to enable the company to complete current contracts, to enter into new contracts and execute the relevant documents; and to represent the company in legal proceedings.

Now the appointment of a provisional liquidator has been described as having the effect of paralysing the company — see *McPherson* at p 99. It is for this reason that it has been judicially established that on the proper exercise of its discretion the court must be satisfied that ultimately the court is likely to make the winding-up orders sought in the petition which has been described as the 'threshold test' in *Re Qintex Ltd (No 3)*[6] at p 638. In *Re McLennan Holdings Pty Ltd*[2] at p 738, Master Lee said:

> Whilst the ultimate fate of the petition must be left to the court finally hearing the matter, a provisional liquidator will not usually be appointed unless it appears in the material that a winding-up order is likely ... This presupposes that there

A should be adequate evidence adduced on an application for appointment of a provisional liquidator to show that a winding up is, in the absence of material to the contrary, likely.

To meet the 'threshold test', Mr Tommy Thomas referred to the three grounds relied on by the instant petition. Section 218(1)(c), (e) and (i) are B invoked by the petitioner to contend that (i) the company had suspended its business for a whole year; (ii) it was unable to pay its debts; and (iii) in any event it is just and equitable that the company be wound up.

In respect of the company not being able to pay its debts, Mr Sri Ram points out that the petitioner bases that ground by proposing to invoke the presumption under s 218(2)(a) which subsection is as follows:

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(2) A company shall be deemed to be unable to pay its debts if —

(a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized D requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.

The s 218 letter of demand is exhibited to the affidavit verifying the petition. The first paragraph of the letter demands the payment of E $1,172,829.52, particulars whereof are given to show that to be the amount owing as at 31 May 1991. The second and ultimate paragraph of the letter is as follows:

And further take notice that in the event of your neglect and/or refusal to make payment of the said sum to us within three (3) weeks of the receipt of this notice, F you shall be deemed to be unable to pay your debts within the meaning of s 218(2) of the Companies Act 1965, and winding-up proceedings shall thereafter be instituted against you.
Dated 18 June 1991.

Mr Sri Ram points out that the letter of demand omitted to state that the G s 218(2)(a) presumption that the company is unable to pay its debts arises if the company has for three weeks after the letter was left at its registered office not only neglected to pay the sum but also failed to secure or compound it to the reasonable satisfaction of the creditor. It is argued by Mr Sri Ram that the leaving out of the right of the company to secure or compound for the amount demanded made the letter ineffective vis-a-vis H raising a s 218(2)(a) presumption. He referred to *Re Perusahaan Jenwatt Sdn Bhd*[7] and to *Re Yap Kim Kee & Sons Sdn Bhd*[8] for some support for the submission. In the former of those two judgments the court held that the letter of demand was bad because the demand was for $295,584.46 when the amount owing was only $25,584.46. In the latter case the third holding in the headnote sets out why the court held that the notice was bad: I

The letter of demand was bad and the company cannot be presumed to be unable to pay its debts because (a) the letter of demand was sent to the company before the civil action on 20 November 1985, the amount of which was disputed; (b) the letter was not signed and it was not stated who the solicitors were who

wrote the letter; (c) the letter demanded 'immediate repayment'; (d) the letter threatened to institute legal proceedings against the company and Yap Kim Kee, and not a winding-up proceeding; and (e) the amount demanded was $232,000 which was greater than the amount stated in the petition.

At p 111 of the report of the latter of the two cases, Zakaria Yatim J, after he had discussed some of the cases referred to him, said:

> Accordingly, the demand must be made in writing and signed by the creditor or his authorized agent, and it must specify the sum due. The demand must be served at the registered office of the company — see J O'Donovan, *The Law of Company Liquidation*, pp 48 and 49. The normal practice is for the creditors to also state in the notice (1) that the company must pay the sum due within 21 days from the date of the service of the demand and (2) failing which the company will be deemed unable to pay its debt and action will be taken to wind up the company.

In my judgment, s 218(2)(a) has to be read as having two limbs, the first of which prescribes what the creditor has to do to invoke the presumption. What the creditor has to do is to serve on the company by leaving at its registered office a demand under his hand or under the hand of his authorized agent requiring the company to pay the sum then due. The second limb prescribes that the debtor company has three weeks within which to pay the sum or to secure or compound for it. Since what the debtor company can do is statutorily prescribed, there is no call for the creditor to spell out what the law prescribes. It is sufficient that it is clear from the contents of the letter of demand that it is a s 218(2)(a) notice which clarity can be achieved, inter alia, by a reference in the letter to the subsection and by the letter giving the debtor three weeks to meet the demand. The effect of the debtor company not complying with one or the other of the three courses open to it as prescribed by the second limb of the sub-subsection need not be spelled out in the letter.

Apart from the reservation that Mr Sri Ram had about the s 218(2)(a) presumption that the petitioner invokes, he was of the view that on the available facts the court was entitled to hold, at this the threshold of the petition, that it is more likely than not that a winding-up order would eventually be made when the petition was heard.

Mr Sri Ram in discharging his role of amicus curiae, by playing the devil's advocate as it were, submitted that in the exercise of its discretion in respect of the appointment of a provisional liquidator the court should have a restrictive approach. In effect his submission on this aspect of the matter was that the court should be slow to appoint a provisional liquidator where the evidence does not suggest some urgency, for example, in that the assets of the company may be in jeopardy unless a provisional liquidator is appointed. As has been seen, case law suggests otherwise. Where the courts are given a discretion without qualification as is the case here, it is not at all desirable that the ambit within which the discretion is to be exercised be plotted. In *Re Club Mediterranean*[5] Bright J, in compiling a list of situations where the discretion was exercised, was at pains to point out that he had not tried to compile an exhaustive list saying 'commercial affairs are infinitely various'. No doubt factors like urgency and danger of dissipation of assets are indeed relevant but they are not necessarily decisive.

Mr Sri Ram had also added another word of caution. He suggested that the court should be wary of the fact that the application could be an abuse of the process of court. *JC Scott Constructions v Mermaid Waters Tavern Pty Ltd & Anor*[9] was cited where reference was made to a case where the winding-up procedures were invoked as a means to have a provisional liquidator appointed although it was never the intention of the petitioner to have the company wound up but only to have the assets of the company preserved. There can be no doubt that in such circumstances an application will indeed be an abuse of process which the court will make short shrift of.

Mr Lee, the senior assistant official receiver, referred me to the New South Wales case of *Cope Allman (M) Pty Ltd v The Marrickville Businessman's Club Ltd*[10] where a winding-up petition had been presented followed by an application for one O'Brien to be appointed provisional liquidator. The application was supported by an affidavit by O'Brien who appeared to have made a preliminary study of the company to be wound up. He formed the opinion that the company was trading at a loss of $10,000 each month and that without selling its premises it would not be able to pay off its creditors. It was recommended that negotiations could be commenced for the company to improve its financial position. McLellard J accepted this to be inconsistent with the proposal that the company be wound up. He went on to state at p 1004:

> ... Clearly it is undesirable that the company should carry on business where it is losing at the rate mentioned, and it seems to me that unless some arrangement can be reached with the creditors, or some compromise, the company should be wound up as soon as possible.
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> However, I think I should appoint Mr O'Brien provisional liquidator for the purpose of ascertaining whether the company's business can be carried on effectively and possibly of ascertaining whether some arrangement or compromise can be reached with the creditors. For that reason I will appoint him for a limited period and stand the notice of motion over until the end of that period so that the plaintiff can advise the court of the present position of the company's trading.

With respect, I would not be prepared to go as far as McLellard J was prepared to go. If the intention of those moving the court is not to proceed with taking the winding-up procedure to its ultimate end, then seeking to have a provisional liquidator will amount to an abuse of process as being made for a collateral purpose.

However, there is absolutely no evidence to suggest that the present application is an abuse of process; instead, I am satisfied that this is a bona fide application, and the court would expect the petition to be proceeded with (and successfully) when it comes up for hearing on 22 January 1992.

For these reasons, I am satisfied that this is a proper case for the court to exercise its discretion under s 231 of the Companies Act 1965, and I am further satisfied that the proposed liquidators, namely, Abdul Jabbar bin Abdul Majid and Ng Kim Tuck, are fit and proper persons to act as provisional liquidators of the respondent company. As to the submissions made on the terms and conditions of their appointment, having regard to the fact that the whole purpose of their appointment is to endeavour to revive the abandoned housing project with financial assistance from TPPT

Sdn Bhd and the fact that the petition is to be heard in less than two months, viz 22 January 1992, the provisional liquidators ought to file a preliminary evaluation report on the respondent company, together with a feasibility report on whether the abandoned housing project can be successfully revised and completed together with specific recommendations as to the ways and means of achieving this objective. Ms J Malathi has confirmed to the court that the provisional liquidators' costs, charges and expenses for work carried out until the hearing of the petition shall be paid by TPPT Sdn Bhd and I so order.

After hearing submissions on the language of the order, set out below are those parts of my order relevant to the appointment of the provisional liquidators:

> ... It is ordered that Messrs Abdul Jabbar bin Abdul Majid and Ng Kim Tuck be and are hereby appointed provisional liquidators of Kemajuan Bersatu Enterprise Sdn Bhd, the abovenamed respondent ('the company'), and to serve as provisional liquidators until the hearing of the winding-up petition in these proceedings on 22 January 1992 (or any adjourned date) or until further order and it is further ordered that the provisional liquidators do file in court, not later than 10am on 22 January 1992, a preliminary evaluation report on the company, together with a feasibility report on whether the housing project commenced by the company in Taman Kemajuan, Ulu Tiram, Johore held under Lot No 2326 CT 7790, Mukim of Tebrau, district of Johore Bahru ('the project') could be successfully revived and completed with recommendations as to the ways and means of achieving such objective and it is further ordered that such reports be served upon the petitioner and TPPT Sdn Bhd and it is further ordered that, subject to terms and conditions to be approved by the court, the provisional liquidators may carry on the business of the company so far as is necessary for the beneficial winding up thereof and, in particular, to revive rehabilitate or otherwise complete the project and for such purpose, the provisional liquidators shall have and may exercise all the functions and powers of a liquidator and it is further ordered that the provisional liquidators' costs, charges and expenses properly incurred by them shall be paid by TPPT Sdn Bhd and it is further ordered that each of the provisional liquidators be empowered individually to exercise any of the foregoing powers pursuant to the Companies Act 1965 s 232(7) and it is lastly ordered that the parties be at liberty to apply.
>
> Dated etc ...

Postscript

The petition to have the respondent company wound up came up for hearing today, 22 January 1992. As expected, the respondent company is not represented, although the papers were served upon it. As directed by the court, the provisional liquidators have filed a preliminary evaluation report (supported by a feasibility report). In the circumstances, I ordered that the respondent company be wound up, and that the provisional liquidators, Abdul Jabbar bin Abdul Majid and Ng Kim Tuck, be appointed liquidators of the company.

Application and petition allowed.

Reported by PS Ranjan